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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re C.E., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. S.E., Defendant and Appellant.	G040297 (Super. Ct. No. DP015844) O P I N I O N

Appeal from an order of the Superior Court of Orange County, James Patrick Marion, Judge. Affirmed.

Linda J. Vogel, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

S.E. (Father), appeals from the order made at the dispositional hearing (Welf. & Inst. Code, § 361)[1] removing custody of now 11-month-old C.E. He contends there is insufficient evidence supporting the juvenile court's findings. We disagree and affirm the order.

FACTS

Detention

C.E. was taken into protective custody in August 2007, a few weeks after her birth, due to allegations of general neglect. Her mother, E.R. (Mother),[2] was just 20 years old and had a history of prostitution, drug abuse, and child neglect. Father was also just 20 years old.

While living in Oregon and Washington, Mother had already lost custody of two older children. In 2006, she failed to seek medical care for a serious health condition for her then two-year-old child, K.R. The identity of K.R.'s father was unknown. After K.R. was taken into protective custody, Mother relinquished her parental rights, and the child was adopted.

In November 2006, Mother's three-month-old baby, J.R., was taken into protective custody due to neglect, Mother's substance abuse, and absent caretaker. On the same day, she was arrested for domestic violence following an altercation with Father, her boyfriend, who was living with her in Washington. The detention report made several allegations regarding Father as concerned J.R., including that he was J.R.'s father, was believed to be Mother's "pimp," and he refused to take custody of the child. The petition repeated these allegations, but was later amended and those allegations deleted. Mother and Father both deny Father was the father of J.R. or that he participated in or had any knowledge of her prostitution activities. Father was, however, present

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

[2] Mother does not appeal.

throughout Mother's pregnancy with J.R. and after his birth. Mother did not comply with her service plan, and had no contact with J.R. Mother moved to California in April 2007, and Father returned to Hawaii where his mother lived. In June 2007, Mother indicated she would relinquish parental rights to J.R.

On August 17, 2007, an Orange County Social Services Agency (SSA) social worker, accompanied by police, went to Mother's residence to conduct a welfare check on 10-day-old C.E. When the police and social worker attempted to enter the front door, Mother slipped out the back door, jumping over a three-foot fence with the baby in her arms. Father at first barred the officials from entering by barricading the door. The record contains differing accounts as to whether Father deliberately tried to stop the entry or was unaware of what was happening. The detention report stated Father said he held the front door against the social worker and police so the child would not be taken. But in the jurisdictional report, the social worker deemed "mostly credible" Father's explanation he was coming out of the bathroom, when he saw the door being opened. Mother had already left the apartment. Father at first blocked the door, unaware of who was trying to enter, but then made no attempt to prevent entry once the police identified themselves.

Mother was found at a neighbor's apartment. Mother told police she ran away because she did not want C.E. to be taken into protective custody. Her apartment was dirty and cluttered, and there were five bags of trash in the kitchen. The refrigerator was empty except for a hamburger container and box of baking soda. Mother admitted smoking marijuana during her pregnancy with C.E. and that she did not obtain prenatal care. Father had come from Hawaii for the birth of C.E. and had been staying with Mother for the past few weeks. The petition, filed August 21, alleged jurisdiction due to Mother's failure to protect and alleged Father "reasonably should have known [C.E.] was at substantial risk in the care of [Mother] and he failed to protect the child."

At the detention hearing, Father asked to have C.E. released to him. He resided in Hawaii, was employed, and said his mother would help him with the infant. In the alternative, Father asked that he be allowed to move in with C.E.'s current caretaker who was Father's cousin. The court ordered C.E. remain out of parental custody.

Detention to Jurisdictional Hearing

In reports for the jurisdictional hearing, SSA explained Father and Mother had been together for about one and one-half years prior to C.E.'s birth. Father was aware of Mother's drug use. He did not know if Mother had received any prenatal care while pregnant with C.E., but did not think it necessary since she already had two children.

Father wanted to obtain custody of C.E. Father said he was willing to complete parenting classes. He intended to return to Hawaii, and planned to live with his mother. SSA was willing to consider placing C.E. with Father if he returned to Hawaii, but wanted to assess his home via an Interstate Compact for the Placement of Children (ICPC) (Fam. Code, § 7900 et seq.) evaluation, and needed to obtain information on Father's mother, with whom Father and C.E. were to reside.

In a subsequent report, the social worker noted that while Father was not the offending parent, he lacked knowledge or skills to raise a baby, and was still involved with Mother. SSA asked that Father be permitted to move into the paternal cousin's home (where C.E. resided) so he could gain some parenting skills.

At the jurisdictional hearing on October 19, 2007, Father and Mother pleaded no contest to the amended petition. The court sustained the petition based on Mother's drug use and neglect, and Father's failure to protect C.E.

At the hearing, County Counsel explained SSA's plan was to allow Father to return to Hawaii with C.E., but only if he stayed with her in Hawaii. The court authorized funds to permit the social worker to travel to Hawaii to ensure C.E.'s placement there. It ordered Father to contact the social worker about his flight plans and

C.E. would be released to him immediately before the flight. The social worker was to check to make sure Father and C.E. were living in the paternal grandmother's home in Hawaii and if they were not, a warrant for both Father and C.E. would be issued. A dispositional hearing was set.

Jurisdictional to Dispositional Hearing

In its first report for the dispositional hearing, SSA explained Father did not return to Hawaii as had been contemplated (nor, apparently, had he moved in with the paternal cousin). The social worker had heard Father and Mother were planning on moving to Reno together, and both had been terminated from parenting classes for nonattendance. However, Father told the social worker Mother had moved to Oregon, and he had moved in with his grandmother who lived in Los Angeles. Father told the social worker he did not believe he needed parent education, but would take classes once he returned to Hawaii. The social worker was concerned Father and Mother were still together, and was concerned about his lack of communication with the social worker.

When the dispositional hearing began on December 5, 2007, County Counsel requested it be continued so SSA could initiate a priority ICPC evaluation in Hawaii. Father's counsel agreed to continuing the hearing, but objected to conducting an ICPC evaluation. The court continued the hearing and ordered the priority ICPC evaluation.

On January 30, 2008, SSA reported the ICPC social worker in Hawaii, Marian Burkheim, informed SSA that Father submitted his ICPC application late and it was missing a lot of required information. Her impression was Father was not committed or motivated to taking custody of C.E. and she was "seriously considering" denying approval of placement under the ICPC.

On February 14, SSA reported that since having returned to Hawaii, Father had been "extremely lackadaisical in dealing with Social Services[,]" and the social worker believed he was indifferent towards C.E. Father had been an hour and a half late

for his scheduled ICPC interview with Burkheim in early February. Burkheim initially wanted to deny his application, but after speaking to a supervisor decided he would get another chance to complete the process.

On February 28, SSA reported Father had an interview with Burkheim and she advised him he needed to become stable, employed, and participate in parenting classes. Burkheim would not approve an ICPC placement request at that time "because [Father] did not appear to be motivated or committed to having [C.E.] in his custody." Father did telephone C.E.'s caretaker (his cousin) weekly and had sent her $400. He had started working.

The contested dispositional hearing took place on March 3, 2008. SSA recommended reunification services for Father. Father was not present. The juvenile court observed Father was very young and immature and while the court had tried to work with Father, "he's kind of dragging his feet a little bit here, and a lot of it is his fault, probably most of it." The court made findings under section 361, subdivision (d), that reasonable efforts were made to prevent or eliminate the need for removal of C.E. from parental custody. It found by clear and convincing evidence section 361, subdivision (c)(1), applied. And it found vesting custody of C.E. with the parents would be detrimental and vested custody with SSA. It ordered reunification services and visitation for Father. Father appealed.

Post-Disposition

A six-month review hearing was set for April 21. In its first report, SSA recommended service be continued for Father and a 12-month review hearing be set. The social worker had tried several times unsuccessfully to call Father. Father did not maintain regular contact with the social worker. His cousin (C.E.'s caretaker) reported Father was employed full time and living with his mother. Father called the cousin a couple times a month, but never asked about C.E.—so the cousin would have to initiate any discussion about the child's development and welfare.

Father told the SSA social worker he did not need to take a parenting class—his mother would teach him whatever he needed to know. Burkheim had also advised Father to take a parenting class and she was still of the opinion Father did not seem particularly motivated to gain custody of C.E. The SSA social worker concluded Father was not yet ready to assume parenting responsibilities. On May 6, the social worker finally reached Father by telephone. Father said he was working full time and had started an on-line parenting class. He was planning on coming to California in late May.

DISCUSSION

1. Substantial Evidence Supports Section 361 Findings

Father contends there is insufficient evidence to support the juvenile court's findings under section 361, subdivision (c)(1), that C.E. should be removed from parental custody. We disagree.

Section 361, subdivision (c), provides in relevant part, "A dependent child may not be taken from the physical custody of his or her parents . . . , unless the juvenile court finds clear and convincing evidence of any of the following circumstances . . . :[¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . . The court shall . . . consider, as a reasonable means to protect the minor, allowing a non-offending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from harm. . . . "

"At a dispositional hearing, the court's findings must be made on clear and convincing evidence. The court must find that the welfare of the child requires that she be removed from parental custody because of a substantial danger, or risk of danger, to

her physical health if she is returned home and that there are no reasonable means to protect her without removing her. [Citation.]" (*In re Kristen H.* (1996) 46 Cal.App.4th 1635, 1654.)

On appeal, we must "determine whether there is any substantial evidence to support the trial court's findings. [Citation.] In making this determination we must decide if the evidence is reasonable, credible and of solid value-such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence." (*In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1326.) "Where insufficiency of the evidence is an issue, an appellate court reviews the entire record in the light most favorable to the order and determines whether any substantial evidence supports the conclusion of the trier of fact. [Citations.]" (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1825 (*Marquis D.*).)

Father contends there is no evidence he posed any risk of detriment to C.E., as her dependency is based entirely on Mother's failing: her drug use, her prostitution activities, and her neglect of her older children. We cannot agree with that assessment. The petition also alleged jurisdiction based on Father's knowledge of Mother's activities (i.e., he knew or reasonably should have known) and his failure to protect C.E. Father pleaded no contest to the petition and does not challenge the court's jurisdictional findings. Father was staying with Mother in Washington when she was pregnant with and gave birth to her child J.R., who became a dependent child in Washington State and to whom Mother lost her parental rights. Father was aware of Mother's drug use and her neglect of her two older children. Father was then present and staying with Mother in California when she gave birth to C.E. and was present in Mother's dirty and cluttered apartment when the social worker came to conduct a welfare check. Father expressed a desire to have custody of C.E. and to return with her to Hawaii. But he balked at enrolling in parenting classes, did not stay in contact with social workers, was dilatory in providing the necessary information for an ICPC evaluation, and showed little interest in

C.E. or motivation to gain custody of her. "The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. [Citations.]" (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) We cannot say the court erred by finding there was a risk of danger to C.E., if placed in Father's custody as he demonstrated little or no commitment to parenting.

Father contends the juvenile court erred by ordering an ICPC evaluation in the first place and thus his noncompliance with the process (and the opinions of the ICPC social worker) cannot be considered. We disagree.

"The ICPC is an agreement among California and other states that governs 'sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption . . . .' (Fam. Code, § 7901, art. 3, subd. (b).) 'The purpose of the ICPC is to facilitate cooperation between participating states in the placement and monitoring of dependent children. [Citation.] Article 2 defines "Placement" as "the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility." (Fam. Code, § 7901, art. 2, subd. (d).)' [Citation.] [¶] With regard to 'Conditions for Placement,' article 3 of the ICPC mandates: 'No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.' (Fam. Code, § 7901, art. 3, subd. (a).) Before any child can be sent or brought into a receiving state 'for placement in foster care or as a preliminary to a possible adoption,' the 'sending agency'

must give written notice to appropriate authorities in the receiving state (Fam. Code, § 7901, art. 3, subd. (b)), and authorities in the receiving state must confirm 'that the proposed placement does not appear to be contrary to the interests of the child' (Fam. Code, § 7901, art. 3, subd. (d))." (*In re Emmanuel R.* (2001) 94 Cal.App.4th 452, 458 (*Emmanuel R.*).)

Father cites *Emmanuel R.*, and other cases that "have concluded the ICPC does not apply to placements with a dependent child's natural parent" (*Emmanuel R., supra,* 94 Cal.App.4th at p. 458; *In re Johnny S.* (1995) 40 Cal.App.4th 969; *Tara S. v. Superior Court* (1993) 13 Cal.App.4th 1834), in support of his contention an ICPC evaluation is not allowed for assessing the propriety of a child's placement with an out-of-state parent. The cases to do not support his argument. In each of those cases, a dependent child's placement with an out-of-state parent was unsuccessfully challenged on the grounds the failure to obtain approval of an ICPC placement request precluded the placement. But none prohibited such an evaluation. Indeed as specifically stated in another case upon which Father heavily relies, *In re John M.* (2006) 141 Cal.App.4th 1564, 1572, "While . . . ICPC compliance is not required for an out-of-state placement with a parent, nothing in the ICPC prevents the use of an ICPC evaluation as a means of gathering information before placing a child with such a parent. In that situation, however, a favorable recommendation by the agency in the receiving state is not a prerequisite to placement if the evaluation and other evidence show that the placement would not be detrimental."

Father also contends the opinions of the ICPC social worker, Burkheim, could not be considered because they were unsubstantiated. We disagree. Burkheim based her opinion that Father was not particularly motivated to obtain custody of C.E., on his lack of responsiveness to the ICPC evaluation process, failing to adequately complete the applications or to show up on time for scheduled interviews. The SSA social worker

similarly reported Father failed to stay in contact with her, balked at taking parenting classes, and although he called C.E.'s caretaker, he showed little interest in the child.

Finally, Father complains the juvenile court failed to specifically find under section 361, subdivision (c)(1), that there were no other reasonable means by which C.E. could be protected without removing her from his custody. To the contrary, the court found by clear and convincing evidence that section 361, subdivision (c)(1), applied. Substantial evidence supports that finding.

2. Applicability of Section 361.2

Father also complains the juvenile court erred by not considering whether C.E. should have been placed with him under section 361.2, which provides for placement with a noncustodial parent when the juvenile court removes children from a custodial parent in a dependency proceeding. "Section 361.2 establishes the procedures a court must follow for placing a dependent child following removal from the custodial parent pursuant to section 361." (*Marquis D., supra,* 38 Cal.App.4th at p. 1820, fns. omitted.) Section 361.2, subdivision (a), provides, "When a court orders removal of a child pursuant to [s]ection 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of [s]ection 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

We agree with SSA that Father waived his argument by failing to raise this contention below. "In dependency litigation, nonjurisdictional issues must be the subject of objection or appropriate motions in the juvenile court; otherwise those arguments have been waived and may not be raised for the first time on appeal." (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558; see also *In re Daniel D.* (1994) 24 Cal.App.4th 1823,

1832 [right to have children placed with maternal grandmother waived by mother's failure to raise it in the juvenile court].)

This is not, as Father suggests, a pure issue of law which may be decided based on the appellate record. (See *In re V.F.* (2007) 157 Cal.App.4th 962, 968.) Section 361.2, subdivision (a), applies only to a parent "with whom the child *was not residing* at the time that the events or conditions arose" that led to jurisdiction. (Italics added.) There are factual issues concerning the applicability of section 361.2 in this case. Although Father's legal residence was in Hawaii, he was living with Mother and C.E., at the time the child was detained. Furthermore, even if that issue were resolved in Father's favor, under section 361.2, the court may consider only a nonoffending parent for placement. The amended petition cited Father's own knowledge of Mother's drug use and inability to adequately care for her children as an additional basis for jurisdiction. Father did not challenge the jurisdictional finding.

DISPOSITION

The order is affirmed.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.